United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7374

ORIGINAL

To be argued by
DAVIS J. STOLZAR

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

MATTHEW J. LAWLOR,

Plaintiff-Appellee,

-against-

THE GALLAGHER PRESIDENTS' REPORT, INC., and CYNTHIA A. BILLINGS,

Defendants-Appellants,

-and-

GULF & WESTERN INDUSTRIES, INC., DAVID N. JUDELSON and MARTIN S. DAVIS,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE LLOYD F. MacMAHON, DISTRICT JUDGE

BRIEF FOR APPELLEE

RICHARD IVES RUDELL and
DAVIS J. STOLZAR
Attorneys for Plaintiff-Appellee
1501 Broadway
New York, New York 10036
(212) 736-6642

DAVIS J. STOLZAR
RICHARD IVES RUDELL
of counsel

V

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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In The

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No. 75-7374

MATTHEW J. LAWLOR,

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STATEMENT OF THE ISSUES

Defendants-Appellants, The Gallagher Presidents' Report, Inc. ("Report") and Cynthia A. Billings ("Billings") appeal from a judgment of $45,000.00 entered in favor of

plaintiff against Report and Billings on June 6, 1975 by the United States District Court for the Southern District of New York (MacMahon, J.). Said judgment was for the claimed libel of plaintiff in an article published by Report in a weekly edition of its newsletter dated May 22, 1973 known as The Gallagher Presidents' Report (the"Presidents' Report"). The District Court dismissed all claims of defamation asserted by plaintiff against defendants Gulf & Western Industries, Inc. ("Gulf & Western"), David N. Judelson ("Judelson"), President of Gulf & Western, and Martin S. Davis ("Davis"), a Vice-President of Gulf & Western ; granted judgment in favor of plaintiff against appellants on the third claim set forth in Count III of the complaint; and granted judgment in favor of defendant Gulf & Western with respect to its counterclaims against plaintiff for the imposition of a trust on profits made from the misappropriation of Gulf & Western's property by plaintiff.

Plaintiff has not appealed from the judgment awarding damages on the counterclaims nor from any other part of the judgment entered below. Defendants-appellants raise the following issues on appeal relating to the

judgment entered against appellants on Count III of the complaint:

1. Is the alleged defamatory news item concerning plaintiff published in the Presidents' Report true in substance?

2. Did the lower court distort the plain meaning of the alleged defamatory news article by misconstruing one phrase therein as accusing plaintiff of a crime under Section 198-b of the N.Y. Labor Law for taking "kick-backs" from applicants for employment with Gulf & Western?

3. In view of the finding of the District Court that appellants did not publish the article with reckless disregard for its truth or falsity, is reversal required for any one of the following separate and distinct reasons that:

> (a) Under New York law plaintiff failed to prove that appellants were motivated by actual malice within the meaning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) since the article deals with a matter of legitimate public interest concerning a private individual; or, in the alternative,
>
> (b) Under constitutional standards, plaintiff is a limited public figure for the

limited range of issues forming the subject matter of the article so that a finding of liability is precluded under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) in the absence of a showing of actual malice; or, in the alternative,

(c) Under New York law, plaintiff failed to prove that appellants were motivated by malice since the article was distributed to subscribers having a particular and common interest respecting its subject matter and is qualifiedly privileged?

4. Assuming arguendo, New York law requires no more than a showing of negligence in the publication of the article to defeat appellants' qualified privilege, did plaintiff sustain his burden of proof in the face of the reliable sources utilized by appellants, the procedures undertaken prior to publication and the substantial accuracy of the article?

5. Assuming arguendo, the alleged defamatory news item is false or that appellants do not have a qualified privilege, or, absent a qualified privilege, that plaintiff has affirmatively shown fault, is plaintiff entitled to no more than nominal damages, particularly in view of plaintiff's unlawful conduct and the proven truth of the basic facts related in the article as found by the Court?

STATEMENT OF THE CASE

This action was tried by the District Court without a jury on October 22, 23 and 24, 1974. At the conclusion of trial decision was reserved by the Court. An opinion was rendered on May 13, 1975 (394 F. Supp. 721) and judgment was entered on June 6, 1975 (440 A). Appellants filed their Notice of Appeal on June 16, 1975 (443 A).

Plaintiff, Matthew J. Lawlor ("Lawlor"), a former Vice-President of Gulf & Western in charge of employee relations, brought this action in diversity for defamation arising out of statements relating to his discharge for cause. The complaint sets forth three counts; the only claim on appeal is set forth in Count III against defendants Report and Billings. Accordingly, Count III is hereinbelow described:

The third cause of action as against Report and Billings is predicated on the publication by Report in its May 22, 1973 Presidents' Report, of which Billings is editor as well as President of Report, of a statement concerning the firing of plaintiff from his position at GULF and his action as a top-ranking officer of GULF,

the statement being false and defamatory and resulting in plaintiff's inability to obtain employment and injury to his credit and reputation, as well as causing plaintiff great pain and mental anguish. The article at issue (Pl. Ex. 18, 472 A), reads in full:

> " 'CHARLIE WONDERFUL' BLUHDORN CRACKS DOWN ON EXECUTIVES. Gulf & Western Industries chairman forced to oust Matthew Lawlor two weeks ago after discovery of questionable practices by Lawlor as v-p employee relations. Lawlor in charge of G&W personnel department. Reportedly set up dummy corporation Mark Group. Opened bank account for dummy corporation. Channeled unsolicited job resumes to Mark Group. Extracted fees for placement of executives with G&W. Charlie eliminates title. Turns over Lawlor's duties to director of personnel David Foreman."

The answers of defendants Report and Billings admit the publication and plead affirmative defenses of truth and privilege.

The third cause of action as against Davis alleged that Davis stated to Billings and/or another employee of Report that plaintiff had extracted fees from GULF for placement of executives with GULF, maliciously and for the purpose of having the same published in the Presidents' Report. The Court dismissed this cause of action as against Davis in the absence of proof connecting

him to the publication.

The District Court granted judgment against Report and Billings in the amount of $45,000 finding that:

> "Although publication of the truth would undoubtedly cause the reader to conclude that Lawlor deserved censure for engaging in a conflict of interest, it could not conceivably have led the reader to conclude that Lawlor was guilty of taking kickbacks for performing his duty of placing executives with G&W. The published statement, therefore, so distorted the truth and magnified the wrong that it unquestionably made a graver impact and inflicted more devastating injury on plaintiff's reputation in the mind of the reader than the truth would have produced.
>
> We find, therefore, that the statement 'extracted fees for placement of executives with G&W' was false and that its publication so distorted the truth as to make the entire article false and defamatory." (420-421 A).

The District Court further held that appellants had no constitutional privilege, citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), since plaintiff was neither a public figure nor a public official, as conceded by the defendants upon the trial. (422 A).

The District Court declined to find that plaintiff was a limited public figure for the limited public event of the Mark Group incident and allow them to invoke the qualified privilege of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), for such a rule would sweep all corporate officers under the restrictive New York Times rule and distort the plain meaning of the public official or public figure category beyond all recognition. (422 A).

The Court did find that defendants were negligent and liable to plaintiff for actual damages (426 A); and concluded that:

> "Since plaintiff has proved that defendants' negligence caused serious damage to his reputation and caused him to suffer pain and mental anguish on his part, we find that damages for those injuries are appropriate. We do, however, mitigate the damages herein awarded by taking into consideration Lawlor's conduct, which was by no means free from wrong. We thus conclude that $45,000 is a fair recovery against defendants Billings and Report under the circumstances." (430 A).

STATEMENT OF FACTS

The plaintiff was Vice President of Gulf & Western in charge of employee relations. In 1972, Lawlor discussed with Judelson establishing an executive placement company within Gulf & Western for the purpose of recruiting people

to Gulf & Western and for placement of people with other companies for fees. In pursuance of this proposal Lawlor set up the Mark Group in or about August, 1972 on an experimental basis outside the organization of Gulf & Western. The Court found that, despite Lawlor's testimony that he was authorized so to do by Judelson, Judelson forbade such organization, and, accordingly, Lawlor was operating the Mark Group as his own venture (414A). Lawlor was assisted in The Mark Group by C. William McDermott ("McDermott") who worked in Lawlor's department and by Stephen Markham ("Markham") (not an employee of Gulf & Western) as an outside contractor to the Mark Group. The Mark Group used its own stationery and the secretarial and printing facilities of Gulf & Western to carry on its activities. It had a telephone answering service and mailing address in Stamford, Connecticut where Lawlor and McDermott live. In addition, in March, 1973 a bank account was opened for the Mark Group by McDermott under Lawlor's direction and authorization at the Union Trust Company also located in Stamford, with McDermott as the authorized signator (77A, 111A).

The Mark Group placed only two executives (shortly before April 26, 1973), Charles W. Tomlinson, who was placed in an executive position with Polymer Industries, Inc., and David Biondi ("Biondi"), who was placed as a tax attorney with Raybestos-Manhattan. The fee paid by Raybestos-Manhattan to Lee Zetlin, was split with the Mark Group ($2,700 to the Mark Group). Polymer paid the Mark Group $9,000. These fees were deposited in the Mark Group bank account in Stamford. Markham was paid a $3,000 commission by the Mark Group for the Tomlinson placement.

Tomlinson was located by Markham and had no connection with Gulf & Western whatsoever, (He was neither an applicant to Gulf & Western, nor did he send his resume to Gulf & Western). Biondi was a Gulf & Western tax attorney, whom Judelson directed Lawlor to out-place; actually his placement was made by Lee Zetlin, an independent executive search consultant.

An investigative consulting firm hired by Gulf & Western to investigate leaks of corporate information to various media (242A - 243A) came across the Mark Group in the course of this investigation and a written report dated April 24, 1973 was prepared by the investigator and delivered to Gulf & Western (253A).

On April 26, 1973, at a meeting attended by Judelson, Davis, Jones (general counsel of Gulf & Western), the investigator and Lawlor, Judelson confronted Lawlor with the matters contained in the report concerning the Mark Group. At the conclusion of the meeting Lawlor was dismissed from Gulf & Western.

About one month later, Presidents' Report in the edition of May 22, 1973, published the offending article.

POINT I

THE EVIDENCE AT TRIAL SHOWS CONCLUSIVELY THAT THE LIBELOUS STATEMENT AT ISSUE IS NOT TRUE

Issue cannot be taken with appellants that "it is well settled in New York as in most jurisdictions that the truth of otherwise defamatory statements concerning a plaintiff, affords an absolute and unqualified defense to a defamation suit." And that, "it is equally well established that truth need not be established to an extreme literal degree; complete accuracy with respect to every detail in the article complained of is not required but only truth in susbstance." (Appellants' brief, page 17 - hereinafter cited "AB 17").

However, the authorities cited by the appellants for the latter proposition would not sustain as true the appellants' version of "truth" in this case. Yarmove v. Retail Credit Company, 18 App. Div. 2d 790, 236 N.Y.S. 2d 836 (1st Dept. 1963) is an appeal from an order granting plaintiff's motion to strike a defense of justification. The Court pointed out that the charges in the credit report, the allegedly defamatory paper, were relatively general, but that the variations between the published matter (the charges) and the more particularized matter pleaded in justification involve identical categories of character and conduct and that some of the variations only involve differences in degree of the qualities attributed to plaintiff in the credit report, the proffered justification being the greater in degree; and considering the nature of the alleged libel, the higher degree includes the lesser. Thus, the Court did not permit the striking of the pleading.

O'Connor v. Field, 266 App. Div. 121, N.Y.S. 2d 492 (1st Dept. 1943) was also a motion on the pleadings, and held that substantial truth is a matter for the jury. Mack, Miller Candle Co. v. The MacMillan Co., 239 App. Div.

738, 269 N.Y.S. 33 (4th Dept.), aff'd 266 N.Y. 489, 95 N.E. 167 (1934), must be read to appreciate the closeness of the facts pleaded in the answer to the libel charged in the complaint which is not so in the instant case.

In the so-called leading case of Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934) the New York Court of Appeals was faced with a question of sufficiency of the pleadings.

The entire paragraph of the opinion from which appellants took their quotation (AB 18) is as follows:

> "This is attacked for lack of breadth and for failure to be direct and explicit. Appellant says, moreover, that while it unquestionably refers to definite acts, it is vague in particularity. No innuendo is pleaded, but it is argued here that the sting of the libel is in depicting plaintiff as striking contemptibly, slyly and with crafty artfulness while the backs of the officials were turned. That is a matter for the determination of the jury. It might very well be said that the sting abided in the rather obvious charge that plaintiff was a player with a mean streak--a sadistic bully--and that the balance of the article illustrated the charge. Even if we accept plaintiff's view, it still seems to us a jury might well say that the justifying facts mean the same thing. A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. 'When

> the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.' (Cafferty v. Southern Tier Pub. Co., 226 N.Y. 87,93). As to particularity, whatever is necessary to enable plaintiff to meet defensive matter may be obtained on motion."

Here, again, the Court of Appeals makes it clear that "truth" is a question for the jury. Here, again, is a case where the pleaded material may be so very close to the truth that a jury could find truth in the offending material. In the instant case the Court, acting as a jury, found that the facts pleaded by appellants did not mean the same thing as the offending statement, and rightfully so.

Appellants' citation of Faulk v. Aware, Inc., 9 Misc. 2d 815, 818-19, 169 N.Y.S. 2d 363, 368 (Sup. Ct. N.Y. Co. 1957), (another decision on a pleadings question), is not as broad as appellants' brief asserts (AB 18). An exact quotation of the Court's language

> "It should be observed, however, that the legal requirement, that the justification must be as broad as the charge, does not necessarily mean that every single reference to plaintiff's activities contained in the articles must be shown to have been true. The test is whether

> the libel, as published, would have no 'different effect on the mind of the reader from that which the pleaded truth would have produced' (Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537, 538). In other words, if the activities or other acts of plaintiff, pleaded as true in the defense, would justify a finding by the trier of the facts that plaintiff was a Communist, or a pro-Communist and a fellow-traveller, the defense would be good from a pleading standpoint".

reveals that the Court merely held that "truth" is up to the jury, and that it may be decided on facts which might not be precisely as detailed as the libelous statement, as long as the details in the answer convey the same meaning as the offending article.

In the instant case, the Court below was the trier of the facts, there being no jury. The Court did weigh all of the statements in the offending article and did weigh all of the proofs offered, and did consider the "sting" of the article.

Judge MacMahon did consider the whole article and its impact in light of the offensive words and found that they "so distorted the truth as to make the entire article false and defamatory." (421A). He, of course, examined the offensive words and analyzed their truth or falsity in great detail in his opinion, and pointed

out the various ways inwhich they were not true. (420-421A).

To adopt the approach of appellants, a line by line analysis of truth, with many true statements camouflaging an offensive false statement, would enable a person to commit libel by surrounding th libelous statement with many non-libelous statements. Such an approach completely negates appellants' "sting" theory espoused in their brief, or misconstrues it. Judge MacMahon, as the trier of the facts, found the "sting" in the offensive words, and found that it pervaded the entire article. His findings as a trier of the facts were not so outrageously wrong that as a matter of law they should be disturbed.

The libelous statement was false.

POINT II

THE DISTRICT COURT DID NOT COMMIT ERROR IN ITS CONSTRUCTION OF THE PHRASE OF THE ARTICLE AT ISSUE

Here, again, issue cannot be taken with appellants that "it is settled law that the meaning of an article alleged to be defamatory depends not on isolated or detached statements in the article but on the article in its entirety" and that "the words and phrases of an article

must be construed together and in fair context and considered in itstotal impact." (AB 25).

November v. Time Inc., 13 N.Y. 2d 175, 178, 244 N.Y.S. 2d 309 (1963) cited by appellants as authority for such proposition came up on the matter of sufficiency of the complaint. The New York Court of Appeals decided that there was enough in the offending paragraph even when taken in the context of the entire article for a jury to determine that the article was libelous.

The Court below did, in fact, consider the article in its entirety in construing its meaning and did consider the offending phrase in fair context in arriving at its total impact, as may be seen from the following portion of Judge MacMahon's opinion (footnotes omitted and emphasis added):

> "Plaintiff contends that the statement 'extracted fees for placement of executives with G&W' is false and defamatory and so distorts the story as to make the entire article false and defamatory. In determining whether words are defamatory, New York law teaches that words must be defined as persons generally understand them in the context in which they are used. The first phrase of the statement is 'extracted fees.' 'Extracted' used together with 'fees' can only mean 'to draw forth against a person's will' or 'to extort'. The second part of

> the statement reads 'for placement with G&W'. Read in context, a reader would undoubtedly understand the statment to mean that plaintiff formed the Mark Group as a dummy corporation, channeled unsolicited job resumes of executives seeking employment with G&W to the Mark Group, and used his position as G&W's vice-president of employee relations to compel 'kickbacks' from executive applicants to G&W as a condition to placing them with G&W. The statement, if false, is therefore libelous since it accused plaintiff of a crime, specifically, violating New York's kickback statute.
>
> "Even assuming that the statement did not accuse plaintiff of criminal conduct, it was, nevertheless, libelous because it clearly intended to expose him to shame or disgrace, induce an evil opinion of him in the minds of right-thinking persons, and injured him in his occupation and profession as a specialist in employee relations.
>
> "We will now determine whether the statement was false, as plaintiff contends, or substantially true, as defendants contend." (418-419A).

The District Court's construction of the statement in the article: "Extracted fees for placement of executives with G&W", that when combined with the remainder of the phrase, "can only mean" that Lawlor, through the Mark Group, compelled "kickbacks" from unwilling executive applicants to Gulf & Western as a condition for employment with Gulf & Western in violation of Section 198-b (2) of the New York

Labor Law (418A - 419A) was reasonable and not strained. While the words of the statement make no reference as to who paid the fees to Lawlor or the Mark Group, it was not unreasonable to infer the additional words "from unwilling executives", for from whom else would such fees be "extracted." Certainly not from the employer, for the employer normally (as in this case) would willingly in the ordinary course of business pay the fees to the executive search agency. In Greyhound Securities, Inc. v. Greyhound Corp., 11 App. Div. 2d 390, 207 N.Y.S. 2d 383 (1st Dept. 1960) in construing whether or not certain words in two letters were reasonably susceptible of a libelous meaning, the Court pointed out (at page 392):

> "...the climate of publication and the character and relationship of the audience to plaintiff must be taken into consideration, as well as the effect that the language complained of could have upon such an audience.....The capacity for harm may very well depend upon the identity of the persons to whom the publication was directed....."

Therefore, the Court concluded that whether the words carried a defamatory meaning was for the jury to determine---in this case for Judge MacMahon as the trier of the facts.

In summary, with respect to the phrase "Extracted

fees" as used in the context of the article in question, no reader of the Presidents' Report, as an experienced business executive well versed in the practices of search companies with respect to the receipt of fees, could have thought otherwise than that Lawlor was charged with taking "kick-backs" from executive applicants in violation of Section 198-b (2) of the New York Labor Law, especially as the District Court observed in its decision that it is common knowledge that placement fees are paid by the employer and not the applicant (437A [n. 17]).

A. Section 198-b (2) of the Labor Law (the "kick-back" statute) Does Apply by its Terms to Lawlor

In its decision, the District Court concluded that the statement "Extracted fees" accused Lawlor of a misdemeanor in violation of Section 198-b (2) of the New York Labor Law.

The so-called "kick-back statute" by its terms applies to all wage earners, not only manual, mechanical or industrial workers. The District Court's conclusion (436A-437A [n. 14]) as to the applicability of Section 198-b (2) of the Labor Law (formerly Section 962 of the Penal Law), is

in accord with the Court's position in People v. Sherman, 201, Misc. 780, /106 N.Y.S. 2d 36 (Court of General Sessions, N.Y. County, 1951) which held that Section 962 of the Penal Law applied to chargemen employed by a candy corporation to sell refreshments in theatres. The Court reviewed many of appellant's authorities for appellant's narrow interpretation of the word "workman" (under the Workmen's Compensation Law) but still concluded that Section 962 of the Penal Law applied. The concurring opinion is quite illuminating in explaining that the law is not to be applied in a limited way.

> "The statute under consideration, while penal in nature, is also remedial. Hence, it is not given the strict construction generally accorded penal laws, but instead is to be equitably and liberally construed. It must be interpreted so as to promote justice, suppress the mischief and advance the remedy.
>
> * * * * *
>
> "Where a word is susceptible of a broad or limited meaning, it should be given the meaning that legitimate sources of interpretation countenance and one that is not repugnant to the clear intention of the Legislature.
>
> * * * * *
>
> "To carry out effectively the clear purpose which the Legislature had in enacting this statute, its application should not be restricted to the narrow and limited groups comprising only manual, mechanical or industrial workers.

> "The key-word of this section is the work 'kick-back'. This is so because the manifest intent of the Legislature was to protect all wage earners from the 'kick-back racket' rather than to define or limit the particular classes to be protected.
>
> * * * * *
>
> "The language of the statute is sufficiently explicit, particularly when considered in the light of the evil sought to be remedied, and the historical background, to permit of a construction that would not vitiate the apparent intent of the Legislature." (Page 42)

For a similar consideration, see People ex rel. Rabinowitz v. Desowitz, 166 Misc.1, 2 N.Y.S. 2d 87 (1938). For a similar approach to the crime of extortion, see People v. Dioguardi,8 N.Y. 2d 260, 268, 203 N.Y.S. 2d 870, 877. The New York Court of Appeal's language if applied to the offending language in the instant case, would bolster the position of the District Court that "extortion" was charged. (418A).

Even if, technically, executives are not included as "workmen" under the "kick-back" statute, nevertheless it was libelous. While an article does not charge a crime (blackmail or extortion) as precisely as defined in the Penal Law, an accusation of conduct quite similar to those crimes and similarly corrupt and blameworthy is libelous per se. Macy v. New York World-Telegram

Corporation, 2 N.Y. 2d 416, 161 N.Y.S. 2d 55 (1958).

B. The Article Did "Magnify" and Distort the Truth As To Lawlor's Acts

The District Court stated in the decision awarding damages, the proposition that the statement "Extracted fees" had so distorted the truth and magnified the wrong that it unquestionably made a graver impact and inflicte' more devastating injury on plaintiff's reputation in the mind of the reader than the truth would have produced. (421A). Implicit in this statement was the statement that Lawlor's engaging in a conflict of interest did not have the same "sting" as the false charge of extracting "kick-backs."

That the District Court's finding of wrongdoing by Lawlor could support other criminal charges than the finding of a charge of "kick-backs" given by the District Court to the phrase "Extracted fees" probably was not considered by the Court as being the interpretation which would be given to the other words of the offending article by the publication's readership, especially since the article did not refer to "misappropriation" of resumes or other Gulf & Western property or the money derived

therefrom, nor did it refer to the unauthorized appropriation and use of services or facilities of Gulf & Western for personal benefit or profit, nor did it refer to the breach of trust by a fiduciary who uses the mails to further a scheme to make secret profits from his position. The appellants seek in their brief to magnify the language of the article. The information developed on the trial was generally not available to the readers, so the readers never really could draw any conclusions about other possible crimes charged to Lawlor. Certainly no ordinary reader, and probably no corporate executive, would conclude that the Presidents' Report was charging Lawlor with a crime when it spoke of "discovery of questionable practices" by Lawlor as v-p - employee relations...set up dummy corporation...Opened bank account for dummy corporation, Channeled unsolicited job resumes to Mark Group."

Even if such charges were made--and proven to be true, it would not be a defense to the libel contained in the "kick-back" charge. See, Yarmove v. Retail Credit Company, 18 App. Div. 2d 790, 236 N.Y.S. 2d 836 (App. Div. 1st Dept. 1963) and the authorities therein cited.

POINT III

THE TRIAL COURT'S FINDING THAT PLAINTIFF FAILED TO DEMONSTRATE "MALICE" ON THE PART OF APPELLANTS DOES NOT REQUIRE REVERSAL OF THE JUDGMENT OF LIABILITY AS TO APPELLANTS REPORT AND BILLINGS

The District Court determined that appellants Report and Billings were liable for actual damages because of negligence in the publication of the article about plaintiff, even though the Court expressly rejected plaintiff's contention that appellants' conduct involved knowledge of falsity or reckless disregard of the truth of the statements contained in the publication. See footnote 23 (438A).

The District Court held that New York State has adopted the minimum "negligence" standard permitted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) as a matter of federal constitutional law for actual injuries to the reputations of private individuals.

The authorities cited by appellants as being contrary to the District Court's holding, to the effect that New York has followed the greater protection given to publishers in Rosenbloom v. Metromedia, Inc., 403 U.S.

29 (1971), and as allowed by Gertz vs Robert Welch, Inc., supra, (see discussion infra) are not generally applicable to the instant case.

In Rosenbloom v. Metromedia, Inc., supra, the Supreme Court stated that a plaintiff could not sustain an action for defamation based on negligence as a private individual in "discussion and communication involving matters of public or general concern" (Page 44). (This is certainly a different standard than the "event of current interest" which appellants brief claims as the Rosenbloom doctrine. (AB 36)).

The Supreme Court, in footnote 12 on page 44 said:

> "We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest."

Gertz changed the Rosenbloom rule by denying to publications the New York Times protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest

when the defamatory falsehood is about a person who is neither a public official nor a public figure. In so doing, however, the Court relegated to the States the definition of the appropriate standard of liability in such cases, provided that punitive damages may not be recovered without proof of knowledge of falsity or reckless disregard for the truth. The decision should be carefully read with respect to the Court's description of public figures. Judge MacMahon, after examining the facts and finding that Lawlor "holds no public office, does not have general fame or notoriety in the community, has no pervasive involvement in public affairs and has not injected himself into a public controversy," held that "he is, therefore, neither a public official nor a public figure." Therefore, Gertz is applicable to the case at bar. (421-422A).

Appellants' concept that under the Gertz standard plaintiff was a "limited public figure" for the"limited issues" of the Mark Group incident to the "limited" readership of subscribers of the Report must be rejected not only because "such a rule would sweep all corporate officers under the restrictive New York Times rule and distort the plain meaning of the public official or public figure category beyond all recognition" (422A),

but also because Gertz (and Rosenbloom)did not create the hybrid class of "limited public figure" or "limited issues." Even New York Times does not create such fictional classes.

In predicating liability upon a negligence standard, the Court below did not commit an error of law. As a matter of fact, the Court applied the standard set forth by appellants' counsel, as shown in the following excerpt from the trial transcript at Page 402.:

> "Mr. REINER...specifically as put in our brief, the Supreme Court has said, 'We hold so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.'
>
> "There is a lot of other language, your Honor, I could go into. That is not necessary. I think the point here is this, that the Supreme Court has laid down a burden of proof upon plaintiffs bringing defamation actions, and that is that not only must they prove that a matter is defamatory, they have to prove some fault in the publication as part of the plaintiff's case.
>
> "I made a motion at the end of the plaintiff's case, your Honor, and I'd like to renew that motion to dismiss on the ground that the plaintiff did not make out a prima facie case. They haven't proved one scintilla; there is not one thing in the record showing

any fault on the part of the publication as part of the plaintiff's case.

THE COURT: When you say fault, what do you mean?
MR. REINER: Negligence.
THE COURT: Negligence?
MR. REINER: Negligence or fault."

(1) New York Law Post - Gertz Does Not Require A Demonstration by Plaintiff That Appellants Published With Knowledge of Falsity Or Reckless Disregard of the Truth

Even if we assume that under New York law, the standard for recovery post-Gertz by a private individual involved in a matter of general or public interest remains dependent upon proof of publication with a knowing falsity or reckless disregard of the truth, that is not the standard to be applied in the instant case, since the Court below found no general or public intereest and that plaintiff was a private person. (438A).

The Appellate Division's most recent decision directly on this point in Safarets, Inc. v. Gannett Co. Inc., __ A.D. 2d __, __ N.Y.S. 2d ___ (Third Dept. 1975) affirming per curiam, 80 Misc. 2d 109, 361 N.Y.S. 2d 276 (Sup. Ct. Broome Co. 1974), was based on the opinion of the New York Supreme Court which in effect held that Gertz does not require the New York courts to abandon the

Rosenbloom rule. The New York Supreme Court then went on to decide "whether the offending article here involves a question of general public interest or concern under Rosenbloom." (Page 280).

Similarly, Mr. Justice Gellinoff's holding in Commercial Programming Unlimited v. CBS Inc., 81 Misc. 2d 678, 367 N.Y.S. 2d 986 (Sup. Ct. N.Y.Co. 1975), is based on the fact that the publication concerns a matter of public interest. The other post-Gertz authorities cited by appellants likewise involve matters found by the courts to be matters of public concern.

However, despite the aforemetioned decisions, the instant case does not involve a matter of general or public concern. Even appellants admits this bytheir argument of "limited issues". (AB 37).

Despite appellants' assertion that the law post-Gertz is authoritative and settled law (AB43), the Supreme Court in New York County in Caldwell v. Bantam Books Inc., (Sup. Ct. N.Y.Co. N.Y.L.J., 11/1/74, page 17, col. 2) and the Supreme Court in Westchester County in Bailey v. Hahn, (Sup. Ct. West Co., N.Y.L.J., 7/23/74, page 12, col. 7) do not agree with appellants' statement of the post-Gertz rule. The Caldwell decision dismissed the complaint as time

barred and further noted in dicta that the complaint was further deficient in failure to allege "any fault" on the part of the publisher as required by Gertz. The Bailey decision, after noting that the matter was one of public concern and "if Rosenbloom were still the law, this Court would be required to grant summary judgment to the defendants..." but under Gertz it is no longer necessary for plaintiff to show actual malice. But the Court required plaintiff to show fault based on whether the defendant acted as a "reasonably prudent publisher."

The most recent case involving post-Gertz law in New York is Bolam v. McGraw-Hill, Inc., (Sup. Ct. N.Y. Co, N.Y.L.J., 8/25/75, Page 6, col. 1). Here the Court holds "that it is the involvement of the plaintiff in a matter of public concern which is pivotal." The Court said that if "plaintiff is in fact Amelia Earhart, defendants will prevail on trial." But if "she is not and ....the statements complained of refer to her and defame her, defendants will be called upon to respond in damages for any damages they have in fact inflicted." The Court also pointed out that no authority was cited by defendant concerning private individuals who complained of libel, not holding public office and whose only involvement in a matter of public concern

arose out of defendant's claims. This latter comment applies to the instant case. Matthew Lawlor is a private person and there is no matter of public concern--except for defendants' claim of "limited" issue.

(2) Appellants' Concept of A Limited Public Figure Misconstrues Gertz

The District Court found that plaintiff was not a public figure. The Court below reasoned that characterizing plaintiff as a limited public figure, even for the instant publication of limited subject matter and limited distribution to subscribers, would make the public figure versus private individuals distinctions meaningless.

The Supreme Court in Gertz, in trying to accommodate the interests of a free press and harm to reputation did not expressly recognize the concept of a "limited public figure" in establishing a test with respect to a designation of individuals as public figures, it said as follows:

> "...in some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 418 U.S. at 351. (emphasis supplied)

The circumstances and facts presented in the instant case are certainly not particularly appropriate for the application of the concept of "a public figure" for a limited range of issues as expressly recognized by the Supreme Court in Gertz. And the Court below so found in its denial of defendants' argument.

(3) Presidents' Report is Not Entitled to a Defense of Qualified Privilege On the Theory of Common Interest

While appellants now seek to assert a defense of qualified privilege based upon the limited nature of the subject matter of the publication and the particular interest of the limited number of corporate executive subscribers to whom it was disseminated, the authorities cited by appellants neither so hold nor do their facts resemble the facts in this case.

Appellants' quotation (AB 49-50) from Shapiro v. Health Insurance Plan of Greater New York, 7 N.Y. 2d 56, 61, 194 N.Y.S. 2d 509 (1959) is accurate but incomplete. The Court went on to say:

> " 'The rule of law that permits such publications grew out of the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person

in whom they have an interest to another who also has an interest in such person...' "

The existence of the qualified privilege in all of appellants' citations is dependent upon the relationship of the publisher of the libelous statement with the aggrieved person, the relationship of the publisher to the publishee, and the relationship of the aggrieved person to the publishee. In each case there were such interralationships in business or professional matters between the members of the triangle, the publisher, the publishee and the aggrieved person, as to give rise to to the privilege.

But in the instant case no proof was offered by the appellants of any relationship between Lawlor and appellants or between Lawlor and the readers of the Presidents' Report or between Presidents' Report and its readers (other than that the readers paid a subscription fee). Nor was there any proof offered as to any legal or moral obligations by any of the triangle to any other person in the triangle in this case.

No such qualified privilege existed in this case.

POINT IV

THE TRIAL COURT'S FINDING OF NEGLIGENCE IS NOT ERRONEOUS

The record evidence clearly establishes that appellants did not act with reasonable care in connection with the publication of the offending article. This finding by the Court amply buttressed in Judge MacMahon's opinion (424 - 426 A) and no further reference thereto is necessary herein. The existence of negligence on the part of defenants is a matter of fact which the Court below, as the trier of the facts, was clearly justified in finding on the status of the proofs presented by defendants. See, Klein v. Biben, 68 N.Y.S. 2d 759 (Sup. Ct. N.Y.Co. 1947).

POINT V

APPELLANTS ARE LIABLE TO PLAINTIFF IN SUBSTANTIAL COMPENSATORY OR GENERAL DAMAGES

In the instant case the Court held that upon a showing of defendants' negligent publishing of the defamatory falsehood about him, plaintiff could recover "actual damages," including, in addition to out-of-pocket injuries, damages for impairment of reputation and standing in the community, for personal humiliation, and for pain and mental anguish,

but that all damages awarded must be solely compensatory and supported by competent evidence showing the harm, although evidence of its dollar value need not be introduced. (426-427 A). See Caldwell v. Bantam Books, Inc., supra; Bailey v. Hahn, supra; Gertz, supra, 418 U.S. at 350; Levine v. Kiss, 47 App. Div. 2d 544, 363 N.Y.S. 2d 101 (App. Div. 2d Dept. 1975); Foerster v. Ridder, 57 N.Y.S. 2d 668 (Sup. Ct. N.Y.Co. 1945); Polakoff v. New York World-Telegram Corp.,1A.D. 2d 884, 149 N.Y.S. 2d 872, aff'd, 2 N.Y. 2d 901, 161 N.Y.S. 2d 151, 141 N.E. 2d 634.

The Court below reviewed the testimony in detail and concluded that plaintiff had a good reputation in the business community, which was undermined by Report's publication of the defamatory falsehood, and that this also caused him pain and mental anguish, that he was a well-educated, talented and industrious executive in the labor relations field, that his position at G&W placed him in charge of labor relations of a major multi-diversified company, that he had been called to Washington D.C., to discuss a position as undersecretary of labor, that he was in his mid-forties, with bachelor

and master's degrees from prestigious colleges, that he was happily married and the father of two children, and a veteran of the United States Marine Corps. It was further established at the trial that, before the article was published, the Mark Group controversy was not well known to the business community, and that Report, by publishing the defamatory falsehood and circulating it to the business community, proximately caused harm to Lawlor's reputation and caused him to suffer great pain and mental anguish as well as damage to plaintiff's reputation in his profession as a personnel director in the business community. The Court further found that plaintiff by his demeanor and testimony, evidenced that he had suffered great pain and mental anguish as a result of the publication of the defamatory falsehood, that since his graduation from college in 1953, plaintiff had worked hard to establish his reputation as an expert in the labor relations field, and that Report, by publishing this falsehood about him, undermined twenty years of hard work and humiliated him before the community which had formerly recognized him as an expert. (427 - 429 A).

The Court then held that since plaintiff proved that defendants' negligence caused serious damage to his

reputation and caused him to suffer pain and mental anguish on his part, damages for those injuries are appropriate, although mitigating the damages awarded by taking into consideration Lawlor's conduct, which was not free from wrong. The Court concluded that $45,000 is a fair recovery against defendants Billings and Report under the circumstances. (430 A).

The Court below, did, in fact, take into consideration the factors suggested by appellants as having a bearing on the amount of compensatory damages to be awarded. The amount thereof was not excessive under the circumstances, nor was the Court limited to an award of nominal damages only. See Polakoff v. New York World-Telegram Corporation, supra; Foerster v. Ridder, supra; Faulk v. Aware, Inc., 244 N.Y.S. 2d 259, 19 A.D. 2d 464, motion denied, 250 N.Y.S. 2d 64, 14 N.Y. 2d 719, 199 N.E. 2d 163, affirmed, 252 N.Y.S. 2d 95, 14 N.Y. 2d 899, 200 N.E. 2d 990, 14 N.Y. 2d 954, 202 N.E. 2d 372, certiorari denied 85 Sup. Ct. 900, 380 U.S. 916, 13 L.Ed. 2d 801, rehearing denied, 85 Sup. Ct. 1328, 380 U.S. 989, 14 L.Ed. 2d 282.

New York Jurisprudence says on the question of damages at Vol. 35, Page 79 (1964 Ed.):

> "The question of the proper damages to be assessed in actions for libel is peculiarly within the province of the jury, and their judgment as to the damages for the wrong which the plaintiff has suffered and the amount which the defendant should be made to pay for falsely and maliciously invading his rights ought not to be disturbed, unless it is so manifestly unjust as to indicate that the jury reached its verdict through passion, bias, or prejudice and not upon principles of a sound discretion, taking into consideration all circumstances in mitigation or aggravation."

Since Judge MacMahon also was the trier of the facts, there being no jury, his assessment of damages should not be disturbed.

CONCLUSION

The decision of the District Court should be sustained in all respects.

Respectfully submitted,

RICHARD IVES RUDELL and
DAVIS J. STOLZAR
Attorneys for Appellee

DAVIS J. STOLZAR
RICHARD IVES RUDELL
Of counsel